89- 1618

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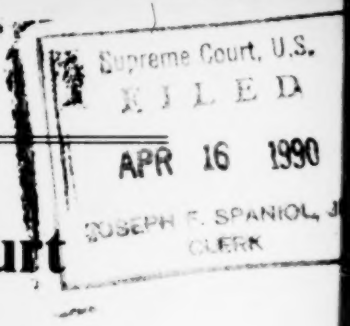

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BUCKLEY BROADCASTING CORPORATION of CALIFORNIA,
d/b/a Station KKHI,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW*

(1) Whether an Employer acts reasonably by withdrawing recognition when all the strikers have been permanently replaced throughout a 354 day strike period; the Union has made no overtures to resume negotiations during the 354 days of the strike, and the collective bargaining agreement had expired 33 months earlier.

(2) Whether the elimination of presumptions by the Board in adopting its *KKHI* rule imposes an unreasonable or insurmountable burden upon Employers to demonstrate a reasonably grounded good faith belief the Union no longer has majority support.

(3) Whether, in a case free of egregious unfair labor practices, imposition of the "bargaining order" remedy rather than a "directed election" deprives the permanent striker replacement work force the self determination rights guaranteed them in the National Labor Relations Act.

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* The questions presented by this case are essentially those now before this Court in *National Labor Relations Board v. Curtin Matheson Scientific, Inc., [Case No. 88-1658, October Term, 1989]*. This Petition does not seek independent relief; rather, it prays that as to this case, the Court enter summary judgment with the Ninth Circuit according to its judgment in *Curtin Matheson Scientific, Inc.*

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OCTOBER TERM, 1989

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For The Ninth Circuit

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 891 Fed.2d 230; Petition for Rehearing and Rehearing En Banc in No. 88-7106, denied February 14, 1990 (Pet. App. 13a-17a); the decision and order of the National Labor Relations Board are reported at 284 N.L.R.B. No. 113 (July 27, 1987); 125 LRRM 1281 (Pet. App. (18a-34).

JURISDICTION

The Judgment of the court of appeals (Pet. App. 1a-12a) was entered in December 7, 1989 and a petition for Rehearing was denied on February 14, 1990. This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Pursuant to S.Ct. R. 29.1, Petitioner, Buckley Broadcasting Corporation of California, d/b/a Station KKHI states that it does not have an affiliate or subsidiaries other than those that are wholly owned.

STATUTORY PROVISIONS INVOLVED

Section 8(a)(5) of the National Labor Relations Act (NLRA) 29 U.S.C. 158(a)(5), provides:

> (a) It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 7 of the NLRA, 29 U.S.C. 157 provides:

> Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 10(e) of the National Labor Relations Act [29 U.S.C. 160(e)] makes an Order of the National Labor Relations Board final and empowers the Circuit Court of Appeals to hear appeals from the Order or to enforce the Order.

STATEMENT

A. Grounds For Writ Of Certiorari

Court Rule 17.1 (a):

> "When a Federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . .

Court Rule 17.1 (b):

> "When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with the applicable decisions of this Court."

B. Statement Of The Case

1. Preliminary Statement

There is an indistinguishable factual matrix common to this case and that of *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, now before this Court as No. 88-1685, October Term, 1989. This Court's decision in the latter is and should be controlling as to the instant matter.

It also will serve to resolve endemic conflicts among courts of appeal and between courts of appeal and the NLRB on the question whether presumptions can be used to determine whether a Union has the support of striker replacements, and whether replacements should be presumed to oppose or to support the incumbent union.

2. The Circuit Court Proceedings Below

On March 7, 1988, the National Labor Relations Board sought enforcement by the Ninth Circuit of its determination in *NLRB v. Buckley Broadcasting Corporation d/b/a Station KKHI* 284 N.L.R.B. No. 113. The case was argued March 15, 1989 and the Ninth Circuit filed its Opinion December 7, 1989, affirming the Board's Order and granting enforcement of the NLRB's bargaining order.

By contrast, in *Curtin Matheson Scientific, Inc.*, the Board was unsuccessful when it sought an enforcement Order from the Fifth Circuit in a case involving facts almost identical to those present in this case. Rehearing was denied. On March 8, 1989 Justice White extended the time within which to file a petition for a writ of Certiorari to and including April 21, 1989. That petition was filed April 17, 1989 and granted June 26, 1989.

3. Common Question Of Law

Both cases present the question whether an Employer may in good faith predicate withdrawal of recognition and refusal to bargain on an assumption striker replacements do not favor the Union in the same ratio as the strikers whom they have replaced, and that, accordingly the Union no longer enjoys majority status.

The Fifth and Ninth Circuits have announced divergent views.

4. Factual Background

Petitioner and Respondent below, is a San Francisco Radio station. For some years, the Station and National Association of Broadcast Employees and Technicians Local 51 ("NABET") executed successive collective bargaining agreements covering the Employer's technical employees. The last agreement expired January 31, 1978. Thereafter the parties negotiated for 14 months, with a central issue being extension of the existing practice of "combo" (ie., NABET-represented technicians, and announcers represented by American Federation of Radio and Television Artistes ["AFTRA"] interchangeably performing the same functions). The Union declared impasse in April, 1979, and the Company put its "final offer" in effect in August, 1979, including broadened "combo" work by AFTRA-represented personnel. NABET struck the Station November 12, 1979. All the strikers were replaced, and by April 22, 1980, two of the strikers formally resigned and informed the Station they would not return in any event. For 354 days the Union made no attempt to resume negotiations.

At some time in 1980, NABET filed an "Article XX" complaint against AFTRA with the national office of AFL-CIO, and that body found in favor of NABET. On October 30, 1989, NABET wrote to Station KKHI alleging "changed circumstances" and demanded that negotiations resume. Having in mind that 33 months had elapsed since the previous contract had expired; that all strikers had been replaced permanently, and that the Union made no offer to return to work, the Employer withdrew recognition and refused to meet.

The Union filed an Unfair Labor Practice charge; a complaint issued and the case was heard by an Administrative Law Judge on August 6, 1981; KKHI filed its exceptions and appeal to the National Labor Relations Board on October 22, 1981, and the Board ultimately rendered its Decision and Order July 27, 1987, eight years and 8 months after the commencement of the strike.

ARGUMENT

This case presents questions of compelling national importance in the field of industrial relations. Presently, there is uncertainty between and among circuits, and between circuits and the National Labor Relations Board as to what constitutes grounds for a good faith Employer doubt as to continuing Union majority status in striker replacement cases. *Buckley Broadcasting (Station KKHI)*, as such, is little more than a convenient symbolic vehicle used by the NLRB to enunciate a "policy". The burden of the Board's Order (230 N.L.R.B. No. 113) is a somewhat esoteric tangent purporting to establish a new policy approach to presumptions concerning continuing majority status.

The Order treats the factual chronology minimally and ultimately concludes that the KKHI case failed at the hearing level upon evidential grounds: the Station offered strike replacement affidavits showing they had not been contacted by the Union, when instead, it should have offered strike replacement affidavits affirmatively showing non-interest in representation by NABET.

The efficacy of this new policy approach remains to be interpreted and applied with consistency, as witness the diametric results by the Fifth Circuit in *Curtin Matheson* dismissing the *Buckley Broadcasting,* doctrine and the Ninth Circuit in ruling on the Board's application for enforcement upholding the doctrine.

If left to stand as unreconciled interpretations upon identical fact situations, the divergent circuit opinions will needlessly foment chaos and industrial disharmony and bring about future burdens upon our Courts. The underlying quandary is all too common in American industrial relations and both Employer and Union need positive guidance.

With both cases before it, this Court has the opportunity to compose divergent circuit views on a matter of national importance. Industrial harmony requires the uncertainty be resolved. No longer should parties to collective bargaining agreements be required to make Draconian choices.

CONCLUSION

Petitioner (Respondent below) asks that Certiorari be granted herein, and that in the event the Court affirms the Fifth Circuit, summary reversal be directed forthwith to the Ninth Circuit Court of Appeals in *National Labor Relations Board v. Buckley Broadcasting Corporation of California, d/b/a Station KKHI.*

Respectfully submitted.

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Attorney For Petitioner
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Corporation d/b/a
Station KKHI

(Appendices follow)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, dba Station KKHI, *Respondent.*	No. 88-7106 NLRB No. 20-CA-15817 OPINION

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted
March 15, 1989—San Francisco, California

Filed December 7, 1989

Before: Richard H. Chambers, Melvin Brunetti, and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Labor

Affirming a National Labor Relations Board order of enforcement, the court held that to overcome the presumption that a union had continued majority representation, an

employer must produce evidence that replacement employees are opposed to union representation.

After negotiations between respondent Buckley Broadcasting Corporation and the National Association of Broadcast Employees and Technicians failed, Buckley's five technicians and engineers went on strike. Buckley then hired five permanent replacements and implemented its new combined operating scheme. NABET instituted proceedings with the AFL-CIO against the American Federation of Radio and Television Artists, claiming that announcers were doing technician work in violation of Article XX of the AFL-CIO constitution. When this dispute was resolved in its favor, NABET approached Buckley and requested further negotiations in light of these changed circumstances. When Buckley refused, citing the time lapse between the expiration of the collective bargaining agreement in 1978 and the renewed request for negotiations in 1980, NABET filed a complaint with the NLRB charging Buckley with an unfair labor practice. The NLRB found in favor of NABET and ordered Buckley to cease and decease from withholding recognition from NABET and from refusing to bargain with NABET. NLRB petitioned for enforcement of this order.

[1] Once a union is recognized by an employer, the union is conclusively presumed to command majority support. [2] Buckley argued that *Arkay Packaging Corp.*, 227 N.L.R.B. No. 397 (1976), established precedent for making the passage of time a relevant consideration for withdrawel of union recognition, and that, coupled with the affidavits of the employees stating that they had not been contacted by the union, it would be reasonable to assume that the strike replacements would be opposed to union representation. [3] Confining *Arkay Packaging* to its unique circumstance of apparent union abandonment, the administrative law judge declined to apply it to the facts of this case, and [4] the NLRB affirmed the ALJ's decision. [5] Buckley argued that the Board's decision cannot be implemented as a matter of equity because it

has the effect of retroactively invalidating presumptions that it relied on in withdrawing union recognition. However, the Board is free to alter its standards provided the changes are rational and consistent with provisions of the Act. [6] The court noted three factors that are applicable to retroactivity analysis. [7] Buckley's argument fails under the third factor. There is no possibility of an inequitable result of the Board's new standard because the new standard works to Buckley's advantage by abolishing the presumption of proportionality in striker replacements. Moreover, under either standard, Buckley would be required to come forward with some evidence of the sentiments of the strike replacements to overcome the presumption of majority support. [8] The court concluded that a bargaining order was the proper remedy in this case and granted enforcement of the NLRB's bargaining order.

COUNSEL

Peter Winkler and Charles Donnelly, National Labor Relations Board, Washington, D.C., for the petitioner.

Victor P. Reed, San Francisco, California, for the respondent.

Della Bahan, Reich, Adell & Crost, Los Angeles, California, for the intervenor National Association of Broadcast Employees & Technicians, Local 51, AFL-CIO.

OPINION

BRUNETTI, Circuit Judge:

The National Labor Relations Board ("NLRB") petitions for enforcement of its bargaining order against respondent Buckley Broadcasting Corporation ("Buckley"). We have

jurisdiction pursuant to 29 U.S.C. § 160(e) and affirm the NLRB's order of enforcement.

FACTS AND PROCEEDINGS BELOW

The facts underlying this case are not in dispute. Buckley operates radio station KKHI in San Francisco. For many years it has had a collective bargaining relationship with the National Association of Broadcast Employees and Technicians ("NABET"), representing the company's engineering and technical employees, and the American Federation of Radio and Television Artists ("AFTRA"), representing the company's broadcast announcers. The last contract between Buckley and NABET expired on February 1, 1978. Negotiations for a new contract failed after Buckley proposed to assign both broadcast and engineering duties to the on-air announcer, a departure from the customary practice of having separate employees perform each function. NABET objected to this operating scheme, and when Buckley's "final offer" for combined operations did not meet with its approval, Buckley's five technicians and engineers went on strike. Eventually two of the striking employees resigned.

In late 1979 and early 1980 Buckley hired five permanent replacements for the striking engineers and implemented its new combined operating scheme. NABET then instituted proceedings with the AFL-CIO against AFTRA, claiming that the announcers were doing technician work in violation of Article XX of the AFL-CIO constitution. The AFL-CIO ruled in favor of NABET in October 1980. When this dispute was resolved in its favor, NABET approached Buckley and requested further negotiations in light of these "changed circumstances." Buckley responded by denying that NABET was still the representative of the engineering and technical employees, citing the lapse of time that had occurred between the expiration of the collective bargaining agreement and the renewed request for negotiations.

NABET then filed a complaint with the NLRB charging Buckley with an unfair labor practice. A hearing was held before an administrative law judge ("ALJ") on August 6, 1981. The ALJ found that Buckley, by withdrawing recognition from NABET and refusing to bargain with it, engaged in an unfair labor practice within the meaning of sections 8(a)(1) and (5) of the National Labor Relations Act. Accordingly, the ALJ recommended that Buckley be ordered to cease and desist from withholding recognition from NABET and from refusing to bargain with NABET.

On July 27, 1987 the NLRB adopted the recommended order, affirming the ALJ's findings of fact and conclusions of law. *Buckley Broadcasting Corp. v. National Association of Broadcast Employees and Technicians, Local 51,* 284 N.L.R.B. No. 113 (1987). The NLRB has applied for enforcement of its bargaining order.

STANDARD OF REVIEW

We will uphold the decision of the NLRB if it correctly applied the law and if its factual findings are supported by substantial evidence on the record. *NLRB v. Island Films Processing Co.*, 784 F.2d 1446, 1450 (9th Cir. 1986). Because the facts in this case are not disputed we will confine our review to the Board's application of the law. Generally the court of appeals will not deny enforcement of an NLRB order unless the Board clearly departs from its own standards or the standards are themselves invalid. *See Garcia v. NLRB*, 785 F.2d 807, 809 (9th Cir. 1986) (deferral decision).

DISCUSSION

Buckley's argument is two-fold. First, it argues that the NLRB exceeded its authority by retroactively invalidating certain presumptions that Buckley claims to have relied on in withdrawing recognition of NABET. Alternatively, Buckley argues that if the NLRB was correct in finding a violation of

the Act, the imposition of a bargaining order is not the proper remedy in light of the passage of time and employee turnover that has occurred since recognition was withdrawn. We address each argument in turn.

A. *Presumptions*

[1] Once a union is recognized by an employer, the union is conclusively presumed to command majority support. *NLRB v. Wilder Construction, Inc.*, 804 F.2d 1122, 1124 (9th Cir. 1986); *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1296-97 (9th Cir. 1984). The presumption becomes rebuttable after the expiration of a collective bargaining agreement. *See NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S. Ct. 57, 54 L. Ed.2d 74 (1977). Before an employer can withdraw from union recognition it must rebut the presumption of majority support by showing with clear and convincing evidence that at the time of withdrawal it has a good faith reasonable doubt of the union's continued majority support. *See Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297-98 (9th Cir. 1978), *cert. denied*, 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed.2d 290 (1979). The ALJ applied this presumption in finding Buckley guilty of violating the Act by withdrawing recognition from the union.

When permanent employees are hired to replace strikers, the Board has applied another rebuttable presumption, the *Pennco* presumption, that the strike replacements support the union in the same proportion as the striking employees. *See NLRB v. Pennco, Inc.*, 250 N.L.R.B. No. 716 (1980). *Pennco* type presumptions, however, have generally met with disfavor in the courts. *See NLRB v. Pennco, Inc.*, 684 F.2d 340, 343 (6th Cir.) (unknown sentiments of strike replacements could only "put the parties in equipoise," and would be insufficient to rebut presumption of continued union representation), *cert. denied*, 459 U.S. 994, 103 S. Ct. 355, 74 L. Ed.2d

392 (1982); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984) ("[T]he presumption that strike replacements support the union in the same ratio as strikers has never been embraced by any circuit."); *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1110 (1st Cir. 1981) (striker replacements generally assumed not to support the union); *National Car Rental System, Inc. v. NLRB*, 594 F.2d 1203, 1206 (8th Cir. 1979) (striker replacements presumed opposed to union); *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 728 (5th Cir. 1978) (same). In finding Buckley guilty of an unfair labor practice the ALJ applied *Pennco* and concluded that Buckley had failed to rebut the presumption of continuing majority support of the union.

[2] The basis for Buckley's good faith doubt was the time that had elapsed between the expiration of the bargaining agreement in February 1978 and the withdrawal of recognition in October 1980. This was supported by affidavits from the five replacement employees stating that they had not been contacted by the union. Buckley argued that *Arkay Packaging Corp.*, 227 N.L.R.B. No. 397 (1976) established precedent for making the passage of time a relevant consideration for withdrawal of union recognition, and that coupled with the affidavits of the employees it would be reasonable to assume that the strike replacements would be opposed to union representation.

[3] *Arkay Packaging* involved unit abandonment by the union; the union made no attempt to insure compliance with a collective bargaining agreement that was in effect, and it failed to respond to the employer's written notification that striking employees would be replaced if they failed to return to work. Confining *Arkay Packaging* to its "unique circumstance" of apparent union abandonment, the ALJ declined to apply it to the facts of this case and concluded that Buckley had unlawfully withdrawn from union recognition. Accordingly, he recommended an order requiring Buckley to recognize the union and resume negotiations.

[4] On appeal to the NLRB the Board affirmed the ALJ's decision and issued the bargaining order, but abolished the *Pennco* presumption that permanent strike replacements support a union in the same proportion as the employees they replace. *Buckley Broadcasting*, 284 N.L.R.B. No. 113 at 5. In declining to adopt *Pennco*, the Board opted instead for a position of neutrality:

> [W]e can discern no overriding generalization about the views held by strike replacements and there- fore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

Buckley Broadcasting, 284 N.L.R.B. No. 113 at 17.

B. *Retroactivity*

[5] Buckley argues that the Board's decision cannot be implemented "as a matter of equity" because it has the effect of retroactively invalidating presumptions that it relied on in withdrawing union recognition. However, the Board is free to alter its standards provided the changes are rational and consistent with the provisions of the Act. *Hotel and Restaurant Employees v. NLRB*, 760 F.2d 1006, 1008-09 (9th Cir. 1985).

[6] In *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124, 1137-38 (9th Cir. 1988), an en banc panel of this court noted three factors that are applicable to retroactivity analysis:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by over-

> ruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

[7] Buckley's argument fails under the third factor. There is no possibility of an inequitable result from retroactive application of the Board's new standard because the new standard works to Buckley's advantage by abolishing the presumption of proportionality in striker replacements.[1] Moreover, under either standard Buckley would be required to come forward with some evidence of the sentiments of the strike replacements to overcome the presumption of majority support.

Looking at the other two factors, there is no "clear past precedent" in this area. The only presumption that Buckley could have relied on is that the strike replacements were opposed to the union. This position has never been endorsed

[1]The *Pennco* presumption would not help the respondent's position even if it were applicable. The ALJ noted that the two strikers that resigned did so after recognition was withdrawn in November 1980. Thus, when Buckley decided to withdraw union representation there were five strikers and five replacements. With this ratio it would appear that the union would have continuing majority representation under *Pennco*.

by this court. *See Whisper Soft Mills*, 754 F.2d at 1387-88 ("The Administrative Law Judge acknowledged that the mere fact that other employees crossed the line to work does not evidence and is insufficient to establish a good faith belief in a loss of majority status. . . ."). Weighing the merits of the Board's new standard it is apparent that Buckley can claim no harm—again because the new standard makes it easier for an employer to withdraw from union recognition.

There has been no showing of "unique circumstances" that would support an assumption that the strike replacements were opposed to the union. *See id.* at 1388. The new standard does not force an inequitable result upon the respondent, and for that reason the respondent's retroactivity argument fails.

C. *Remedy*

Buckley objects to the "drastic" remedy of a bargaining order, suggesting instead that the passage of time and employee turnover in this case would make a representation election or a remand for reconsideration of the need for a bargaining order more appropriate. We disagree.

The Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-16 (1975), discusses the propriety of a bargaining order in this type of situation. *Gissel Packing* involved an employer's refusal to bargain in addition to independent unfair labor practices that would have made a fair election unlikely. In such cases, the Court noted, "the Board is not limited to a cease-and-desist order. . . . If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain.' " *Id.* at 610 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)). The Court continued by noting that "[t]he Board's authority to issue the [bargaining] order is appropriate, we should reemphasize, where there is also a

showing that at one point the union had a majority. . . ." *Id.* at 614.

Here there is no question that the union enjoyed majority status at least until the strike was called. Because the Board properly determined that Buckley had committed an unfair labor practice by withdrawing union recognition, it follows that under *Gissel Packing* the proper remedy was a bargaining order.

Regarding Buckley's argument that the passage of time since it withdrew recognition should be a consideration, this court has already held that the passage of time since the withdrawal of recognition is irrelevant. *See NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1153 (9th Cir. 1977). Were it otherwise, the *Pacific Southwest* court reasoned, an employer could benefit from causing excessive delays in the appellate process. *Id.* Similarly, employee turnover since the withdrawal of union recognition is not a relevant consideration. *Id.*; *NLRB v. Wilder Construction Co.*, 804 F.2d 1122, 1124-25 (9th Cir. 1986) (where the existence of a good faith doubt as to continued majority representation is at issue, the objective facts must be evaluated as of the date of the refusal to bargain).

Buckley's final claim that this remedy will result in "coerced representation" is without merit. "There is, after all, nothing permanent in a bargaining order, and if . . . the employees clearly desire to disavow the union, they can do so. . . ." *Gissel Packing*, 395 U.S. at 613.

CONCLUSION

[8] Because Buckley failed to produce any evidence that the replacement employees were opposed to union representation it failed to overcome the presumption that the union had continued majority representation. Buckley's retroactivity argument fails because the new standard makes it easier for

an employer to withdraw union recognition, and under either standard Buckley would have had to present some evidence of the union sentiments of the replacements. A bargaining order is the proper remedy in this situation. The NLRB's order is affirmed, and enforcement of the NLRB's bargaining order is granted.

Enforcement GRANTED.

Appendix B

No. 88-7106

NLRB No. 20-CA-15817

United States Court of Appeals

for the Ninth Circuit

National Labor Relations Board,
Petitioner,

and

National Association of Broadcast Employees & Technicians,
Local 51, AFL-CIO,
Intervenor,

vs.

Buckley Broadcasting Corporation of California,
d/b/a Station KKHI,
Respondent.

Petition For Reconsideration,

and

Suggestion For Rehearing En Banc

Petition By Respondent

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Buckley Broadcasting Corporation
of California, d/b/a Station KKHI

United States Court of Appeals

for the Ninth Circuit

National Labor Relations Board,
Petitioner,

v.

Buckley Broadcasting Corporation of California,
d/b/a Station KKHI
Respondent.

No. 88-7106

NLRB No. 20-CA-15817

Petition For Rehearing
and
Suggestion For Rehearing En Banc

Rules 35(b) & 40—FRAP
Circuit Rule 35-1

Respondent BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, d/b/a/ Station KKHI, petitions the honorable Court that it reconsider its Opinion issued in the above captioned on December 7, 1989, and re-hear the matter EN BANC, and for Good Cause, shows the following:

I

GROUNDS FOR MOTION

1. These proceedings, and issues considered, constitute a question of exceptional importance in the field of Labor Relations.

2. The Opinion of this Court is in direct conflict with an existing opinion by the Fifth Circuit treating the same legal issue applied to substantially similar operative facts and involves or affects a rule of national application in which there is an overriding need for national uniformity in the law of Industrial Relations. See: *Curtin Matheson Scientific, Inc., vs NLRB* 859 F2d 362 (5th Circuit, 1988) 129 LRRM 2881; 864 F2d 791 362 (5th Circuit,

1988, Rehearing Denied). [See, also, *National Car Rental System, Inc., v. NLRB* 594 F2d 1203 (8th Cir. 1979).]

3. *Curtin Matheson Scientific Inc., vs NLRB* presently is before the Supreme Court of the United States on Writ of Certiorari. *National Labor Relations Board v Curtin Matheson Scientific, Inc.,* No. 88-1685, October Term, 1989. Briefs have been filed, and oral argument was heard December 4, 1989.

II

CHRONOLOGY OF THESE PROCEEDINGS

Briefs on behalf of Petitioner, Invervenor and Respondent were filed with this Court during June, July and August, 1988. The matter was heard on oral argument, and submitted to this Court for its judgment on March 15, 1989.

On or about that date, Petitioner NATIONAL LABOR RELATIONS BOARD sought and received an extension of time in which to petition for Certiorari in the *Curtin Matheson Scientific, Inc.,* case.

Respondent counsel was not aware of this at the time briefs were filed, nor was he aware of this development at the time of oral hearing on this matter and in consequence, could not inform this honorable Court of the pendency elsewhere of any similar or related case.

This Court issued its Opinion December 7, 1989.

This Petition For Rehearing, and Suggestion for Rehearing En Banc is timely made (FRAP 40).

III

PRAYER

Respondent BUCKLEY BROADCASTING CORPORATION of California, d/b/a Station KKHI, respectfully prays that this matter be reheard by this Court EN BANC, or, in the alternative that no Writ of Mandate issue herein pending final determination by the Supreme Court of issues before it in *National Labor Relations Board v. Curtin Matheson Scientific Inc.*, No. 88-1685, October Term, 1989.

Dated: December 19, 1989

BUCKLEY BROADCASTING
CORPORATION,
a California corporation,
dba Station KKHI

By /s/ VICTOR P. REED
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Its Attorney

Appendix C

No. 88-7106
NLRB No. 20-CA-15817

United States Court of Appeals
For The Ninth Circuit

National Labor Relations Board,
Petitioner,

v.

Buckley Broadcasting Corporation of California,
dba Station KKHI,
Respondent.

ORDER
[Filed February 14, 1990]

Before: Chambers, Brunetti, and Noonan, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix D

BUCKLEY BROADCASTING—

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, d/b/a STATION KKHI, San Francisco, Calif. and BROADCAST EMPLOYEES (NABET), AFL-CIO, LOCAL 51, Case No. 20-CA-15817, July 27, 1987, 284 NLRB No. 113

Lewis S. Harris, for General Counsel; Ralph M. Phillips, Los Angeles, Calif., for union; Victor P. Reed, San Francisco, Calif., for employer; Administrative Law Judge David G. Heilbrun.

Before NLRB: Dotson, Chairman; Johansen, Babson, and Stephens, Members.

[*Text*] The Judge found that the Respondent did not have sufficient objective considerations to support its asserted good-faith doubt of the Union's majority status and therefore that its November 1980 withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. While we adopt the judge's conclusions, we do so for the following reasons.

The facts are essentially not in dispute and are set forth in greater detail by the judge. The Union and the Respondent have had a collective-bargaining relationship for a number of years. Contract negotiations pursuant to the Union's timely notice of reopening were begun before the 1 February 1978 expiration of the most recent collective-bargaining agreement. A primary stumbling block in negotiations was the Respondent's desire to institute "combo," i.e., assignment of engineering and announcing work to one on-air employee, rather than the historical practice of having separate employees perform each function. The parties' disagreement on this issue led to impasse on 22 August 1979, after which the Respondent implemented its final offer. When negotiations resumed in September 1979, the Union was willing to accept the concept of combo if its member employees were assigned to do the work. The Respondent, however, wished to assign the work to its employees represented by the American Federation of Television and Radio Artists (AFTRA). The Respondent's five employees represented by the Union struck on 12 November 1979.

When, pursuant to its final offer, the Respondent began assigning combo work to its AFTRA-represented employees, the Union instituted proceedings against AFTRA pursuant to jurisdictional dispute procedures set forth in article XX of the AFL-CIO constitution. In October 1980 the proceedings were concluded in favor of the Union.

During the period between the commencement of the strike and the conclusion of the article XX proceedings, the Union made no attempt to resume negotiations with the Respondent. In support of its bargaining position, the Union sought to induce advertisers away from the Respondent, an endeavor that in at least one case was successful. In the meantime, the Respondent hired permanent replacements for the five strikers, and two of the strikers resigned their positions with the Repsondent.

Upon resolution of the jurisdictional dispute, the Union sent a letter dated 30 October 1980 to the Respondent requesting bargaining in light of the "changed circumstances." By letter dated 6 November 1980, the Respondent withdrew recognition from the Union. In so doing it denied the Union's assertion that it was the exclusive representative of the Respondent's engineering and technical employees, rejected the Union's reliance on the AFL-CIO proceeding as creating "changed circumstances" for negotiations, and cited the substantial period of time between the expiration of the collective-bargaining agreement and the Union's request for further negotiations.

In addressing the Respondent's claim of good-faith doubt of the Union's majority status, the judge rejected as a matter of law the basis for its asserted good-faith doubt put forth by the Respondent in its 6 November 1980 letter, i.e., the passage of time between the expiration of the collective-bargaining agreement in February 1978 and the Union's 30 October 1980 letter. In addition, the judge addressed the Respondent's alternative contention that it asserted good-faith doubt is supported by its hiring of permanent replacements for the strikers and strengthened by the fact that two of the strikers resigned. The judge rejected this argument as well, relying on the presumption that strike replacements support the union in the same ratio as the strikers, and further finding that the Respondent presented no actual evidence

that the strike replacements were opposed to representation by the Union.[2] Accordingly, the judge concluded the the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1).

In its exceptions the Respondent argues, inter alia, that under the circumstances of this case the presumption regarding striker replacments is inapplicable, and assert that the fact support its good-faith doubt. We consider the presumption concerning strike replacements below.

Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification.[3] On expiration of the certification year, the presumption of majority status continues but may be rebutted.[4] An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonanble doubt of the union's majority status at the time the employer refused to bargain.[5]

The presumption of continuing majority status serves two important functions: first, it promotes continuity in bargaining relationships, i.e., gives the relationship "some measure of perma-

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[2] The Respondent introduced affidavits of the five strike replacements stating only that they had never been contacted during the strike by the Union.

[3] Ray Brooks v. NLRB, 348 U.S. 96, 98-104, 35 LRRM 2158 (1954).

[4] Celanese Corp. of America, 95 NLRB 664, 28 LRRM 1362 (1951), cited with approval in Ray Brooks, supra.

[5] Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 89 LRRM 2879 (2d Cir. 1975), enfg. 210 NLRB 443, 86 LRRM 1129 (1974); Allied Industrial Workers Local 289 v. NLRB, 476 F.2d 868, 82 LRRM 2225 (D.C. Cir. 1973), enfg. 192 NLRB 290, 77 LRRM 1889 (1971); Terrell Machine Co. v. NLRB, 427 F.2d 1088, 73 LRRM 2381 (4th Cir. 1970), enfg. 173 NLRB 1480, 70 LRRM 1049 (1969).

nence,"[6] and, second, the presumption protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and prevents an employer from impairing that right without objective evidence that the representative the employees have designated no longer enjoys majority support.[7] There is, in effect, a corollary to the presumption of continuing majority status which is that the Board presumes that, generally, at least a majority of *new* employees support the union.

In Pennco, Inc.,[8] the Board reaffirmed a more controversial and less established presumption concerning union majority, i.e., that permanent strike replacments hired during a strike support the union in the same ratio as the striking employees whom they replaced.[9] It is this presumption that we scrutinize and ultimately abolish, for the reasons discussed below.

As a matter of policy, there is no warrant for a presumption of strike replacement support for an incumbent union. Indeed, prior

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[6] NLRB v. Century Oxford Mfg. Corp., 140 F.2d 541, 542, 13 LRRM 819 (2d Cir. 1944), enfg. 47 NLRB 835, 12 LRRM 49 (1943). Chairman Dotson acknowledges the importance of continuity in bargaining relationships, but he does not necessarily accord it absolute supremancy in all contexts. See his and former Member Dennis' joint dissent in Gibbs & Cox, 280 NLRB No. 110, 123 LRRM 1034 (June 24, 1986) (withdrawal of recognition in a separately recognized unit which was assertedly "merged" into a larger overall unit).

[7] Pennco, Inc., 250 NLRB 716, 104 LRRM 1473 (1980), enfd. 684 F.2d 340, 111 LRRM 2821 (6th Cir.), cert. denied 459 U.S. 994, 111 LRRM 2823 (1982). See also Fall River Dyeing & Finishing Corp. v. NLRB, 55 LW 4706, 125 LRRM 2441 (June 6, 1987).

[8] Supra, 250 NLRB 716.

[9] In approving this presumption of strike replacement support for the union, the Board in Pennco simultaneously rejected a contrary presumption, urged by the employer in that case, that strike replacements and nonstriking employees *oppose*, or do not support, the union. As discussed more fully below, we continue to reject such a presumption of strike replacement opposition to or nonsupport of the union.

to 1975, there was no such presumption. In Jackson Mfg. Co.,[10] the panel majority affirmed the trial examiner's dismissal of an allegation that the employer had unlawfully withdrawn recognition from the union during a strike, following the hiring of replacements for all the striking employees. More specifically, the panel adopted the following rationale of the trial examiner:

"General Counsel's contention that Respondent unlawfully refused to bargain with the Union on and after June 10, 1958, rests upon the assumption that the Union's majority status established by consent of the parties following a card check in August 1957, continued unaffected throughout the duration of the strike and regardless of the fact that the strikers had been permanently replaced. This contention would prevail, and General Counsel so concedes in his brief to me, only if the strikers retained their employee status throughout the entire period, being entitled to immediate reinstatement upon application at the close of the strike. As I have concluded that under the circumstances of this case the strike was an economic one and not an unfair labor practice strike as urged by General Counsel, it is evident that no replaced striker retained his employee status. Consequently, at the time of its demands for resumption of bargaining, on June 9, 1958, it is doubtful that the Union represented anything near a majority of the employees, unless it could be shown (as it was not) that the replacements hired during the strike had chosen the Union to represent it—a most improbable situation."[11]

In S & M Mfg. Co.,[12] the panel majority of then Members Brown and Jenkins stated that the validity of any finding of unlawful refusal to bargain on the part of an employer depends on the existence of a majority support for the union on the date of the employer's refusal to bargain. There, the employer effectively refused to bargain further with the union on a certain date,

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[10] 129 NLRB 460, 47 LRRM 1005 (1960).

[11] Id. at 477-478. We cite this case only as an indication that the presumption that strike replacements support the union is not long held, and do not pass on other findings made by the trial examiner.

[12] 172 NLRB 1008, 68 LRRM 1403 (1968).

without, however, questioning the union's majority status. The panel majority found that on the date of the employer's refusal to bargain, the only employees working were returning strikers who had resigned from the union or newly hired employees who had crossed the union's picket line to go to work and who were "not shown to have manifested their support of the Union." Thus, the panel majority was unable to find that there were *any* union adherents among the employees working on the date the employer effectively refused to bargain. In dissent, then Member Fanning argued that:

"[A]n established bargaining representative which, as here, goes on strike with the support of all employees should be entitled to a presumption of continuing majority status, at least until it is challenged by the Company or put to the test in a Board election."[13]

Nevertheless, the panel majority dismissed the allegation of unlawful refusal to bargain, finding that the General Counsel had failed to satisfy his burden of establishing that the union enjoyed majority status on the date the employer refused to bargain with the union.

In Peoples Gas System,[14] the Board found that the employer lawfully withdrew recognition from the incumbent union on the basis of the employer's reasonable doubt of the union's continued majority status, which reasonable doubt was itself based on, inter alia, the fact that 40 percent of the employees had been permanently replaced during the economic strike which occurred 3 years prior to the employer's withdrawal of recognition.[15] In this regard, the Board stated:

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[13] Id. at 1009-1010.

[14] 214 NLRB 944, 87 LRRM 1430 (1974).

[15] Also, there had been a 17-percent accretion to the unit after the strike, with none of the accreted employees signing union authorization cards, and there was an approximately 35-percent turnover of employees during the 8-month period prior to the employer's withdrawal of recognition.

"While it is of course possible that the [strike] replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation, it was not unreasonable for [the] Respondent to infer that the degree of union support among these employees who had chosen to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf [of] Union-sponsored objectives."[16]

Thus, the Board in People Gas continued to refrain from creating any presumptions about the pro- or antiunion sympathies of strike replacements.

However, in Cutten Supermarket,[17] the Board, without any supporting rationale or citation to apposite precedent, implied in dictum that strike replacements are presumed to support the union in the same ration as those whom they have replaced. In that case, the employer withdrew recognition from the union, asserting that it possessed a reasonable doubt, based on objective considerations, of the union's continued majority status. More specifically, on the date that the employer withdrew its recognition of the union, its employee complement consisted of four striking employees, three strike replacements, and the nonstriking assistant manager (who the employer asserted was a bargaining unit employee, and not a supervisor within the meaning of Section 2(11) of the Act, and who was, therefore, assertedly includable in the employer's computations of employee support for the union).

In rejecting the employer's assertion of reasonable doubt about the union's continued majority status, the Board found that the nonstriking assistant manager was a supervisor, and not a rank-and-file employee whose union sentiments could properly be considered in determining whether the union continued to enjoy the support of a majority of the bargaining unit employees. Thus, the Board found that on the date that the employer withdrew its recognition of the union, there were seven employees in the unit: four striking employees and three strike replacements. As to the

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[16] 214 NLRB at 947.

[17] 220 NLRB 507, 90 LRRM 1250 (1975).

strike replacements, the Board correctly stated that there was no presumption that strike replacements and nonstriking employees were *opposed* to the union. The Board also found that the employer had produced no affirmative evidence to support its contention that the strike replacements and nonstriking individuals were opposed to the union. However, with reference to the strike replacements, the Board inexplicably stated:[18]

"Indeed, it is a well-settled principle that *new employees* are presumed to support the union in the same ratio as those whom they have replaced.[11]

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"[11] True Temper Corp., 217 NLRB [1120], 89 LRRM 1228 (1975); Maywood Packing Co., 181 NLRB 778, 781, 73 LRRM 1539 (1970); Laystrom Manufacturing Co., [151 NLRB 1482, 58 LRRM 1564 (1965)]."

Apparently, this was the first time that the Board linked the presumption on *new employee* (i.e., normal economic turnover) support for an incumbent union to strike replacements. We emphasize that the Board did so in dictum and without rationale, or precedent. First, the cases relied on by the Board in footnote 11 of the excerpted passage above involved new employees in the course of normal economic turnover, and not strike replacements.

Second, the Board summarized the evidence of support for the union in Cutten Supermarket as follows: "four strikers who clearly supported the Union and *three replacements whose union sentiments were not known.*" 220 NLRB at 509 (emphasis added). Thus, notwithstanding its apparent earlier linkage of the presumption of new employee support for an incumbent union to strike replacements in this case, the Board clearly did not actually *apply* any such presumption of strike replacement support for the union to the facts before it.

In any event, in Beacon Upholstery Co.,[19] the Board found that the employer had lawfully withdrawn recognition from the union

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[18] Cutten Supermarket, 220 NLRB at 509 (emphasis added).

[19] 226 NLRB 1360, 94 LRRM 1334 (1976).

on the basis of a reasonable doubt that the union enjoyed the majority support of the employees. On the date of the employer's withdrawal of recognition, there were 13 employees in the bargaining unit: 10 strike replacements and 3 employees who had not gone on strike. Thirteen striking employees had been lawfully discharged 4 days before the employer's withdrawal of recognition. The administrative law judge, affirmed without comment by the Board, found that the employer had rebutted the presumption of continued majority support for the union flowing from the recently expired collective-bargaining agreement simply by establishing that the only employees in the bargaining unit as of the date of the employer's withdrawal of recognition were 3 nonstrikers and 10 strike replacements (all 13 of the striking employees having been lawfully discharged prior to the withdrawal of recognition). The judge stated: "Under these circumstances I do not believe that it can be presumed that the strike replacements supported the Union in the same ratio as the discharged strikers."[20]

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[20] Id. at 1367-1368. The chairman notes that the judge did note that the Board in Cutten Supermarket, supra, had applied *to strike replacements* the presumption that new employees support the union in the same ratio as those they replaced. In not applying that presumption to the strike replacements in Beacon Upholstery, the judge found that the striking employees in Beacon Upholstery, unlike those in Cutten Supermarket, had been discharged, and that therefore "the Union's loyalty lay with [the discharged strikers, whose interests] were diametrically opposed to those of the strike replacements." He finds this proposition to be no less applicable in the case of *undischarged* strikers, such as those in Cutten Supermarket, and he finds the two cases in question not materially distinguishable in that regard. In any event, however, he finds that the judge in Beacon Upholstery was correct in not applying *to strike replacements* the presumption that new employees in a *normal turnover* situation support the union in the same ratio as those they replaced. In this regard, he rejects rather than tries to distinguish, the application of this presumption to the strike replacements in Cutten Supermarket. As indicated above, he finds that the Board's application of this presumption to the strike replacements in that case was both unnecessary—dictum—and unsupported by rationale or precedent.

About 15 months after Cutten Supermarket, and only 2 weeks after Beacon Upholstery, the Board again addressed the issue of presumptive support for or opposition to a union on the part of strike replacements in Arkay Packaging Corp.[21] There, a panel majority found that the employer lawfully withdrew recognition from three unions on the basis of its reasonable doubt about the continued majority status of those unions. The majority expressly affirmed the administrative law judge's finding that the unions' *presumptive* majority status flowing from their collective-bargaining agreements had been rebutted by the fact that the unions failed to respond at all to the employer's written notifications to the unions and to the striking employees that the latter would be permanently replaced if they did not return to work by a specified date; the striking employees were, in fact, permanently replaced; and the unions made no attempt to contact the employer or monitor the application of the still-current collective-bargaining agreements during the strike. Thus, the judge found, and the Board panel majority expressly agreed, that:

"It is reasonable to conclude that none of the three Unions in fact had been designated by any of the replacements, nor is there evidence to the contrary. This and their apparent lack of interest for several months reasonably cast serious doubt on each union's continued majority status."[22]

The majority found that, under the circumstances, the employeer had sufficient objective bases to support a reasonable doubt that the *striking employees* themselves continued to support the unions. Turning its attention to the strike replacements, and without referring to Cutten Superemarket or Beacon Upholstery, the majority stated:

"[W]e would not . . . charge Respondent, in fact or in law, with a belief that [the strike replacements] desired representation by the Unions. [The presumption that new employees support a union in the same ratio as those whom they have replaced] has been held to obtain in the normal turnover situation . . . . But, in

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[21] 227 NLRB 397, 94 LRRM 1197 (1976).

[22] Id. at 397.

the strike situation present in this case, it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements . . . . favored representation by the Union to the same extent as the strikers [citing Peoples Gas, supra, and setting forth the same excerpt from that case that is set forth herein at fn. 16, supra]. The facts certainly would not support such a presumption. And since the replacements' hiring no more has been heard from them to demonstrate any degree of union support than has been heard from the strikers. There is, therefore, at least as much justification for not indulging in a presumption that the replacements favor the Unions and for finding that Respondent had reasonable grounds for not believing that to be so, as there is for finding, as we have, that it was reasonable for Respondent to question the continued union adherence of the striking employees."[23]

However, in Windham Community Memorial Hospital,[24] the Board set out to clarify the law on the issue of whether strike replacements may be presumed to support the union. The Board stated, "The general rule . . . is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced."[25] The Board explained that it had declined to follow that "well-settled principle" in Arkay Packaging, and had held instead that the employer

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[23] Id. at 397-398. In declining to apply to *strike replacements* the presumption that a majority of new employees in a normal turnover situation support the union, the majority expressly rejected the fully articulated argument in favor of such a presumption raised by then Member Jenkins in his dissenting opinion.

[24] 230 NLRB 1070, 95 LRRM 1565 (1977), enfd. 577 F.2d 805, 99 LRRM 2242 (2d Cir. 1978).

[25] Id., 230 NLRB 1070, citing Cutten Supermarket, supra, and Surface Industries, 224 NLRB 155, 163, 93 LRRM 1074 (1976), where the judge, in an opinion adopted by the Board, relied on Cutten Supermarket, in applying the new employee presumption to strike replacements. However, as seen from the discussion of Cutten Supermarket supra, the application of the presumption of new employee support for the union to the strike replacements in that case was in dictum, and was not supported by any analysis or by apposite precedent.

in Arkay Packaging could presume that the strike replacements did *not* support the union, because of the "unique circumstance that the union had apparently abandoned the bargaining unit." The Board in Windham thus held that Arkay Packaging represented a limited exception to the presumption that new employees, including strike replacements, support the union.

Finally, in Pennco, supra, the Board *rejected* the employer's contention that the presumption of new employee support for the union does not apply to strike replacements. In doing so, however, the Board stated simply:

"The Board has long held that [the presumption of strike replacement support of the union] applies as a matter of law, and it is incumbent upon Respondent to rebut it even, and perhaps especially, in the event of a strike."[26]

The Board in Pennco cited no cases in support of its assertion that the presumption in question was "long held." Indeed, as the preceding discussion of cases clearly demonstrates, this presumption was not "long held" at all, but in fact was not articulated in any fashion until Cutten Supermarket in 1975, only 5 years prior to Pennco, and even then (i.e., in Cutten) in dictum and without support rationale or precedent. Nor has the Board in cases subsequent to Cutten involving this presumption (including, as seen, Pennco itself) provided any such supporting rationale. We perceive none. On the contrary, as discussed below, we perceive substantial reasons to eliminate this presumption.

Although the Board has continued to apply the presumption of strike replacement union support,[27] the circuit courts have uniformly rejected it, even when the Sixth Circuit in Pennco enforced the Board's Order but specifically declined to adopt either the Board's or the employer's suggested presumption. Rather, the court found that given the facts of the case, the evidence was

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[26] 250 NLRB at 717.

[27] E.g., I T Services, 263 NLRB 1183, 111 LRRM 1229 (1982) (presumption applied but sufficient evidence presented to rebut it).

sufficient "only to put the parties in equipoise."[28] The court continued, however, finding that "equipoise is not enough for Pennco to demonstrate by objective evidence good faith doubt as to the Union's majority status. Pennco would need some further evidence of union non-support . . ."[29] Similarly, in Windham Community Memorial Hospital, v. NLRB,[30] The Second Circuit declined to endorse the Board's presumption, and enforced the Board's Order by concluding that the employer was not in turn, entitled to a presumption that the strike replacements did not support the union.

In cases where the courts have denied enforcement, two courts have appeared to base their decisions on the premise that strike replacements may be presumed not to support the union, thus concluding that the Board's presumption was unwarranted.[31] Most recently, the Ninth Circuit noted that the presumption has

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[28] 684 F.2d at 343.

[29] Id.

[30] 577 F.2d 805, 99 LRRM 2242 (2d Cir. 1978).

[31] National Car Rental System v. NLRB, 594 F.2d 1203, 100 LRRM 2824 (8th Cir. 1979); Soule Glass & Glazing Co. v. NLRB 652 F.2d 1055, 107 LRRM 2781 (1st Cir. 1981). See also NLRB v. Randle-Eastern Ambulance Service, 584 F.2d 720, 99 LRRM 3377 (5th Cir. 1978).

The Chairman further notes that the Eighth Circuit's rejection of the presumption of strike replacement support for the union in National Car Rental System v. NLRB, supra, was couched in particularly strong terms:

"If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees favored representation by the union even though they had crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment."

594 F.2d at 1206. The Chairman adds that indeed, and perhaps not coincidentally, the employer in National Car Rental System argued before the administrative law judge that "in order to presume that strike

never been embraced by any court, and affirmed an administrative law judge's conclusion that under the facts of that case, it was unrealistic to presume that the strike replacements supported the union.[32]

Just as there is no articulated basis in reason or policy for a presumption that strike replacements support the union in the same ratio as the striking employees they replace, so too is there no evidentiary or empirical basis for such a presumption.

Presumptions are "fixed rule[s] of law," creating for the party against whom the presumption operates the burden of producing other evidence to rebut the presumptive fact.[33] More specifically, a rebuttable presumption of fact simply shifts to the party against whom the presumption operates the burden of producing evidence to rebut the presumption by establishing the contrary of the presumed fact.

As an evidentiary matter, presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved.[34] In this light we have, as seen, carefully reviewed the Board's past decisions and assessed our experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status. Thus incumbent unions and strikers have sometimes shown hostility toward the permanent

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replacements supported the Union we must also presume tha they are idiots." 237 NLRB 172, 174, 99 LRRM 1027 (1978).

[32] Whisper Soft Mills v. NLRB, 754 F.2d 1381, 118 LRRM 3022 (9th Cir. 1984).

[33] 9 Wigmore, Evidence, § 2487 at 295-296 (Chadbourn rev. 1981); see also McCormick, Evidence, § 342 at 803 (2d ed. 1972).

[34] McCormick, Evidence, § 343 at 807 (2d ed. 1972).

replacements,[35] and in some instances, the union has lacked interest, at least for the duration of the strike, in negotiating on the replacements' behalf.[36] At the same time, permanent replacements are typically aware of the union's primary concern for the striker's welfare, rather than that of the replacement. In this regard, the replacements' attitude towards union representation may be influenced by this awareness, which in turn undermines the basis for an evidentiary presumption of support for the union.[37] In light of these factors, we can find no basis for presuming that strike replacements who have accepted employment and are therefore willing to cross a picket line in order to go to work favor union representation. Accordingly, to the extent that Pennco relied on such a presumption, that case is overruled.

On the other hand, we find the contrary presumption equally unsupportable. Thus, the hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative.[38] As the court in Pennco noted, "the Board correctly points out that the failure to join an economic strike may not indicate a lack of support for the union, but rather may demonstrate employees' economic concerns."[39] In this regard, an employee may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives. The presumption of union disfavor is therefore not factually compelling. Moreover, adoption of this presumption would disrupt the balance of com-

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[35] See, e.g., I T Services, 263 NLRB 1183, 111 LRRM 1229 (1982); Beacon Upholstery Co., 226 NLRB 1360, 94 LRRM 1334 (1976); Tital Metal Mfg. Co., 135 NLRB 196, 49 LRRM 1466 (1962).

[36] See I T Services, supra; Arkay Packaging Corp., 227 NLRB 397, 94 LRRM 1197 (1976).

[37] See I T Services, supra; Beacon Upholstery, supra.

[38] NLRB v. Frick Co., 423 F.2d 1327, 73 LRRM 2889 (3d Cir. 1970); Rogers Mfg. Co. v. NLRB, 486 F.2d 644, 84 LRRM 2577 (6th Cir. 1973).

[39] NLRB v. Pennco, supra, 684 F.2d at 342.

peting economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line.[40]

Based on the foregoing, we can discern no overriding generalization about the views held by strike replacements and therefore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require "some further evidence of union non-support"[41] before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

Turning now to the present case, we agree with the judge that the Respondent has not established sufficient objective considerations to support its withdrawal of recognition from the Union. The only factor presented by the Respondent is its hiring of five permanent replacements at a time when there were only three remaining strikers. This fact, by itself, is insufficient to establish a good-faith doubt. Nor can we ascertain the replacements' union sentiments either from their having crossed a peaceful and sporadic picket line or from the Union's failure to contact the replacements during the strike. Rather, more evidence would be requried to support a good-faith doubt, as these events, common to the hiring or replacements, do not adequately demonstrate the replacements' union sentiments. The Respondent, however, has failed to present other evidence indicating the union sentiments of the replacements.[42] Thus we cannot conclude, even absent the

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[40] Pennco, Inc., 250 NLRB 717, 104 LRRM 1473. Chairman Dotson agrees that a presumption that strike replacements oppose the union is not factually compelling, has no empirical foundations, and is thus insupportable for that reason alone. Accordingly, he finds it unnecessary to rely on the policy reason set forth in Pennco and invoked here by his colleagues for not adopting such a presumption.

[41] NLRB v. Pennco, supra 684 F.2d at 343.

[42] As noted earlier, the affidavits of the five strike replacements introduced by the Respondent state only that they were not contacted by

presumption on which the judge relied, that the Respondent has established sufficient objective considerations to support its claim of good-faith doubt.[43] Accordingly, in agreement with the judge, we find that the Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act.

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the Union since the strike began. There is no evidence concerning the replacements' union sentiments.

[43] We agree with the judge that here, unlike Arkay Packaging Corp., 227 NLRB 397, 94 LRRM 1197 (1976), there is no evidence that the Union abandoned the bargaining unit. In this regard, as found by the judge, the Union continued to "shadow" the bargaining relationship by pursuing the AFL-CIO internal jurisdictional dispute resolu

No. 89-1618

In the Supreme Court of the United States

OCTOBER TERM, 1989

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, D/B/A STATION KKHI, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1618

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, D/B/A STATION KKHI, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 891 F.2d 230. The decision and order of the National Labor Relations Board (Pet. App. A18-A34) are reported at 284 N.L.R.B. 1339.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1989. A petition for rehearing was denied on February 14, 1990 (Pet. App. A17). The petition for a writ of certiorari was filed on April 16, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates radio station KKHI in San Francisco. For many years it has had a collective bargaining rela-

tionship with the National Association of Broadcast Employees and Technicians (NABET), representing the company's engineering and technical employees, and the American Federation of Radio and Television Artists (AFTRA), representing the company's broadcast announcers. The last contract between petitioner and NABET expired on February 1, 1978. Negotiations for a new contract failed after petitioner proposed to assign both broadcasting and engineering duties to on-air announcers. On November 12, 1979, petitioner's five technicians and engineers went on strike. Pet. App. A4, A18.

Petitioner thereafter hired five permanent replacements for the striking engineers and implemented its new operating scheme. On October 30, 1980, after securing a favorable ruling from the AFL-CIO in its jurisdictional dispute with AFTRA, NABET contacted petitioner and requested further negotiations in light of "changed circumstances." One week later, on November 6, 1980, petitioner withdrew recognition from NABET, contending that the union no longer represented a majority of the engineering and technical employees. Pet. App. A19.

2. Acting on charges filed by NABET, the Board found that, by withdrawing recognition from NABET and refusing to bargain, petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. A18-A34. The Board rejected petitioner's contention that it had a reasonable, good-faith doubt of NABET's majority status at the time it withdrew recognition from the union. In reaching that judgment, the Board held that it would make no presumption concerning the extent to which striker replacements support the union. *Id.* at A21-A33. Noting that the courts of appeals had "uniformly rejected" its prior position (*id.* at A29) – that permanent replacements are presumed to support the union in the same ratio as the striking employees whom they replaced – the

Board "carefully reviewed [its] past decisions and assessed [its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status." *Id.* at A31. The Board concluded that no such "universal" generalizations could be drawn. It therefore resolved to "review the facts of each case" and "require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status." *Id.* at A33.

Applying that principle, the Board found that petitioner had not established a sufficient good-faith basis for withdrawing recognition from NABET. The Board explained (Pet. App. A33):

> The only factor presented by [petitioner] is the hiring of five permanent replacements at a time when there were only three remaining strikers. This fact, by itself, is insufficient to establish a good-faith doubt. Nor can we ascertain the replacements' union sentiments either from their having crossed a peaceful and sporadic picket line or from the Union's failure to contact the replacements during the strike. Rather, more evidence would be required to support a good-faith doubt, as these events, common to the hiring o[f] replacements, do not adequately demonstrate the replacements' union sentiments.

The Board ordered petitioner to cease and desist from withholding recognition from NABET and from refusing to bargain with the union. Pet. App. A34; 284 N.L.R.B. at 1345, 1347.

3. The court of appeals enforced the Board's order. Pet. App. A1-A12. The court first held that the Board did not

err in applying its new no-presumption rule in petitioner's case. Rejecting petitioner's contention that the rule should not be applied retroactively, the court explained that "the Board's new standard * * * work[ed] to [petitioner's] advantage by abolishing the presumption of proportionality in striker replacements." *Id.* at A9. The court also upheld the imposition of a bargaining order, notwithstanding "the passage of time and employee turnover in th[is] case." *Id.* at A10.

ARGUMENT

Petitioner asks (Pet. 5) this Court to review the Board's no-presumption rule, according to which the Board makes no presumption concerning the union sentiments of striker replacements. In *NLRB* v. *Curtin Matheson Scientific, Inc.*, No. 88-1685 (Apr. 17, 1990), this Court upheld the Board's rule, both as an empirical matter and as a matter of sound labor policy. As petitioner freely concedes (Pet. i n.*, 5), the decision in *Curtin Matheson* is dispositive. Indeed, the Court's opinion in *Curtin Matheson* makes clear (slip op. 5) that the no-presumption rule at issue in that case was first articulated in the present case. Since petitioner raises no other issues, the petition should be denied.*

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* Although petitioner states one additional question—whether "imposition of the 'bargaining order' remedy rather than a 'directed election' deprives the permanent striker replacement work force [of] the self determination rights guaranteed them in the National Labor Relations Act" (Pet. i)—the petition does not address that issue at all. Indeed, notwithstanding the articulation of that additional question, petitioner states that "[t]he questions presented by this case are essentially those" in *Curtin Matheson*, and it acknowledges that the petition "does not seek independent relief" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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